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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,
Petitioner,
vs.
PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

No. 1094. 94

PETITIONER'S REPLY BRIEF.

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PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
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No. 1084.

PETITIONER'S REPLY BRIEF.

I.

Respondent's argument in its brief in support of its contention that the evidence did not warrant the submission to the jury of the issue whether the engineer's negligence proximately caused or contributed to cause Tennant's death is plainly unsound. Such argument, properly analyzed, amounts to no more than a contention that **because no eye-witness could be produced who observed Tennant's exact position and what he was doing at the very instant when the engine was suddenly moved upon him without warning,** a jury may not be permitted to find that there was any causal connection between the failure to ring the bell and his injury and death. Such, in effect, is the ruling of the Court of Appeals herein. The unsoundness thereof readily

appears from the decisions of this Court in **Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446**, and **New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892**, referred to in our original brief. In the Tiller case, as here, there was no eyewitness to the casualty, and hence no testimony as to Tiller's exact position or just what he was doing at the very instant he was struck, or how he happened to come upon or in dangerous proximity to the track upon which he was struck. A similar fact situation existed in the Marcone case.

In the instant case, after the last push of the engine to the south there was a wait of "five or ten minutes" (R. 197). And **after** this last push had been made and the engine had stopped, Tennant was seen by the engineer standing alongside of the cab, putting his raincoat under the cab in the box. After putting away his raincoat he took out his cap and jacket and put them on, and then walked "around" the engine to the front thereof (R. 196). What time he consumed in doing these things, before he reached the front of the engine, does not definitely appear, but obviously a jury could find that he was about the front of the engine for a very brief interval of time before it was put in motion, without warning, and he was there run upon and cut to pieces. Whatever may have been his exact position, and whatever he may have been doing or attempting to do at the precise instant, **it may be readily inferred that a sounding of the bell, as the rule required, would have saved his life.** As said by Judge Kerner in his dissenting opinion, "It was a permissible inference for the jury that the failure to sound the bell was the proximate cause of Tennant's death" (R. 309).

Respondent in its argument in its brief (pp. 27-29) advances one "conjectural possibility" after another as to what, it is said, Tennant may have been doing when run upon, none of which are supported by any evidence. Such fanciful hypotheses, so conjectured or imagined, can afford no ground for the reversal of a judgment that is supported

by the testimony. Terminal Railroad Association v. Farris (8th Cir.), 69 F. (2) 779, l. c. 785. One such conjectural hypothesis, which respondent in its brief (p. 28) says is "the strongest possibility in the case," is **directly contrary to the testimony**, namely, the theory that Tennant may have walked around the north end of the engine and back on the east side thereof and then sought to climb between the cars. Cole, the fireman, on cross-examination testified that during all of the wait mentioned he was on the east side of the engine keeping a lookout, and that **Tennant never walked past him** (R. 219, 220). The evidence, indeed, makes it entirely plain that Tennant went around to the rear, that is, the north end of the engine shortly before the casualty, did not return therefrom, and was run upon at that place. As pointed out in our original brief, it was his duty to remain with the engine and protect it and the cut of cars from other movements on the track (R. 156, 166, 232); and the presumption is that he was in the performance of that duty when killed. The evidence does not show that it was either his duty or his custom to leave the engine before the train was ready to start on its northern journey, as respondent argues. And whether, under the attending circumstances of fact, the failure to ring the bell proximately caused or contributed to cause his death was a question of fact for the jury whose finding thereon should have been allowed to stand by the Court of Appeals. Certainly it cannot be said that "all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." **Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256; Story Parchment Co. v. Paterson Parchment Paper Co. et al., 282 U. S. 555, 566, 65 L. Ed. 544.**

In holding that a jury could not be permitted to find that the negligence of respondent's engineer in failing to ring the bell proximately caused or contributed to cause Tennant's injury and death **because no eyewitness could be produced who saw Tennant's exact position and precisely**

what he was doing at the time he was run upon, the ruling of the Court of Appeals is directly contrary to the decisions of this Court in Tiller v. Atlantic Coast Line R. Co., supra, 63 S. Ct. Rep. (2) 444, 87 L. Ed. 446; New York Central R. Co. v. Marcone, supra, 281 U. S. 345, 74 L. Ed. 892, and Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906, and to other decisions of this Court that were extant when the Court of Appeals promulgated its opinion herein, on March 31, 1943, and that had been called to the Court's attention, and is plainly out of accord with the decision of this Court in **Bailey v. Central Vermont Railway, Inc., 63 Sup. Ct. Rep. 1062, 87 L. Ed. 1030**, rendered on June 15, 1943.

In the **Bailey case**, supra (63 Sup. Ct. Rep. 1062), Bailey, who was in the employ of the defendant railway company as a section man, was engaged in opening the hopper of a car of cinders on a bridge by turning a nut with a wrench, there being a narrow footing at the side of the car and no guard rail. Upon his second attempt to turn the nut it spun, the hopper opened, and he fell to the ground below, a distance of some eighteen feet, sustaining injuries from which he died. This Court, in holding that the case was one for the jury, said:

> "The right to a trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. **It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.** That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has pro-

vided. **To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.**" (Emphasis ours.)

This Court's ruling in the Bailey case serves to make it all the plainer that under the evidence adduced the instant case is one for the jury, and that the ruling of the Court of Appeals that a jury may not be permitted to find, from inference arising from the evidence, that Tennant's death resulted in whole or in part from the failure of the engineer to ring the engine bell constituted a usurpation of the functions of the jury and operated to deprive this plaintiff of a right accorded to her by the Employers' Liability Act, namely, the right to have the issues of fact in such a case resolved by a jury and not by the Court of Appeals.

II.

Respondent in its brief further contends that the evidence did not suffice to take to the jury the issue of negligence on the part of respondent's engineer, and that therefore the decision of the Court of Appeals reversing the judgment below was right, though not placed upon that ground. But we submit that this contention is entirely unsound. No amount of argument can alter the fact that in this case respondent's engineer violated a clear and explicit rule of the company providing that "the engine bell must be rung when an engine is about to move" (R. 60, 61). As we have said, such a rule requires no construction, and of itself constitutes substantial evidence that reasonable care requires the caution that the rule directs; and it was respondent's duty to enforce the rule as written. Montgomery v. Baltimore & Ohio R. Co. (6th Cir.), 22 F. (2) 359. Nevertheless, respondent was permitted to introduce a mass of testimony as to what its assistant superintendent, Keeler, told its employees regarding the in-

terpretation or application of the rules and the custom and practice in the yard in regard to the ringing of the bell. Such testimony, if admissible at all, simply served to raise a conflict in the evidence, for petitioner adduced positive testimony that both the rule and the custom and practice required that the bell be rung when an engine was about to move after having stood for a time in a stationary position as upon the occasion here in question (R. 60, 61, 80, 93); and this was corroborated by respondent's witness Keeler on cross-examination (R. 134). It cannot be doubted that the issue of negligence in this case was one for the jury. As said in **Bailey v. Central Vermont Railway, Inc., supra, 63 Sup. Ct. Rep. 1062, l. c. 1064,** "to withdraw such a question from the jury is to usurp its functions."

The contention that the evidence showed, as a matter of law, that Tennant was guilty of negligence constituting the sole cause of his injury and death does not warrant discussion.

III.

Petitioner respectfully submits that this case is one calling loudly for the issuance by this Court of its writ of certiorari to bring the case here for review. Not only will the decision of the Court of Appeals herein, if allowed to stand, deprive this petitioner of the right to a trial by jury accorded her by the Employers' Liability Act and result in a gross miscarriage of justice, but an important question of law is involved which the Court of Appeals decided in a way not in accord with the applicable decisions of this Court and which may well seriously affect the administration of the law in other cases arising under the act. The rationale of the ruling of the Court of Appeals complained of is that because no eyewitness could be produced who observed Tennant's exact location and precisely what he was doing or attempting to do when run upon, there was a total lack of any evidence to support a finding that his death resulted in whole or in part from the failure of

the engineer to ring the engine bell. Such ruling is not only out of accord with the applicable decisions of this Court, but constitutes an erroneous interpretation of this Court's opinion in **Tiller v. Atlantic Coast Line R. Co., supra, 63 Sup. Ct. Rep. 444**, which the Court of Appeals had before it. We submit it should not be allowed to stand as a precedent. It is of the highest public importance that the rights accorded railroad workers and their dependents by the Employers' Liability Act be properly recognized and enforced by every court in the land in which an action may be brought under the act.

Wherefore, petitioner again prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit herein be reversed.

Respectfully submitted,

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